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July 27, 2010

**SENT VIA EMAIL ONLY**

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New Mexico Environment Department  
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**Re: Comments on draft rules for CWA Section 401 certifications,  
20.6.2.2001-.2003 NMAC**

Dear Mr. Saums:

Thank you for the opportunity to review the draft rules for certification of Federal National Pollutant Discharge Elimination System (NPDES) Permits (20.6.2.2001 NMAC), federal permits for discharge of dredged and fill material (20.6.2.2002 NMAC), and other federal permits (20.6.2.2003 NMAC), which are all being promulgated pursuant to §401 of the Clean Water Act, codified at 33 USC §1341, and 1978 NMSA, §74-6-5(B) (2009). My comments are as follows.

A threshold comment relates to the certification process. The rules are drafted to reflect the manner in which the Department has historically conducted certifications—by certifying the federal draft permit. This is one way in which the certification may be undertaken. *See, e.g.*, 40 CFR §124.54(b) (2009) (addressing certification for section 301(h) variances). However, the federal scheme allows for other ways in which certification may take place.

Under federal law, a request or application for certification may be submitted to the certifying State agency by the applicant at any time prior to a new discharge

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or prior to the renewal of an existing permit, if an applicant can provide the information necessary to determine whether the discharge will be in compliance. See 40 CFR §121.2 (requiring the contents of a certification to include a statement that the certifying agency has “examined the application made . . . to the licensing or permitting agency” or “examined other information furnished by the applicant sufficient to permit the certifying agency to make the statement . . . that there is a reasonable assurance” the activity will not violate water quality standards); *accord* 20.6.2.2001.G(2) NMAC (stating that the “permit certification or denial . . . shall include . . . a statement that the department has examined the application or other relevant information”); *cf.* 40 CFR Part 121, Subpart C (providing the process for application for certification by EPA when a state has not designated a certifying agency). See *generally* CWA §401(a)(1); 40 CFR Part 121 (“State Certification of Activities Requiring a Federal License or Permit”). It may be helpful to draft the rules to include these alternative methods of processing a request for §401 certification.

Comments specific to certain provisions are detailed below. The comments with respect to 20.6.2.2001 also apply to the corresponding provisions of 20.6.2.2002 and 20.6.2.2003 NMAC.

**2001.B(1)-(2)** address certification and certification with conditions. CWA Section 401(d) requires a certification to “set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any application . . . will comply with any applicable” limitations, standards, prohibitions, and any other requirements. The limitations set forth in the certification are thereafter conditions of the certification. *Id.* We suggest including this Section 401(d) language in 2001.B(2) to clarify the types of conditions that must be included in the certification. In addition, 40 CFR §124.53(e)(2) requires the certifying state agency to cite the CWA or state law reference in support of any condition that is more stringent than a condition in the draft permit. We suggest also including the §124.53(e)(2) language in 2001.B(2). In the alternative, reference to the foregoing could be included in 2001.G(4).

**2001.D(1)** provides notice for general permits by posting on the Department’s website. Providing notice solely on the Department’s website would require interested parties to visit the website on a daily basis in order to be adequately informed. We suggest also providing notice by publication in the state register and by email to those persons on a general mailing list maintained by the department.

**2001.D(2)(e)** provides notice for individual permits to certain affected government entities. We suggest making the identified entities consistent with those entities identified in 20.6.2.3108.E NMAC (“any affected local, state, federal, tribal or pueblo governmental agency, political subdivisions, ditch associations and land grants, as identified by the department”).

**2001.E(1)-(2)** provide that notice shall include “a statement that the department will accept written comments on the permit certification or denial during the comment period.” The Department, however, will not have taken action on the certification prior to the comment period. We therefore suggest replacing “permit certification or denial” with “possible actions under 2001.B” or something to that effect. Also, it is not clear whether “written comments” includes electronic submissions. We believe it should include electronic submission and suggest including an express reference to submissions by email.

**2001.G** provides that the Department shall issue a final permit certification, issue a statement of denial with reasons for the denial, or waive its rights to certify. We suggest that this language track the language/format of 2001.B, which references four types of action that may be taken. We also suggest that the rule require the Department to provide reasons for any decision made by the department. This will assist in subsequent review of the decision.

**2001.G** further provides that the Department shall send a copy of the “final permit certification or denial to the” EPA when it is issued, which will generally be within 33 days from the date a request to certify is received by the department. Submitting the decision to the EPA at this time creates a timing issue, however, if the Department’s decision is appealed pursuant to 2001.H, because the EPA will issue the final permit, including the conditions in the certification, after it has received the certification from a state. In the event that administrative review results in a revised certification, the applicant must thereafter try to obtain a modification of the final permit. To prevent this complication, we suggest that certification be deemed final when the time for appeal has passed or when administrative review is complete. At that time, the certification would be sent to the EPA.

**2001.G** also provides that “[t]he permit certification or denial shall be in writing” and sets forth the content of the writing. First, we suggest that 2001.G provide for a writing in support of any action that may be taken by the Department under 2001.B, including waiver. Second, many of the statements that are required in the writing pertain only to a certification decision and not to a statement of

denial. We suggest identifying the statements that must be included with respect to each of the possible actions that may be taken by the department under 2001.B.

**2001.G(4)** provides that the certification shall include "a statement of any conditions which the department deems necessary or desirable with respect to the discharge of the activity." The word "desirable" should be deleted. Our understanding is that conditions for certification must be necessary to achieve compliance with applicable standards and regulations. If a "desirable" condition is not necessary to achieve compliance, it cannot be imposed. Any condition that is imposed should be supported by identifying the applicable law that establishes the need for such condition, *see, e.g.*, CWA §401(d), and by providing the technical analysis upon which the condition is based.

**2001.H** provides that any person who is adversely affected by the certification or denial of a specific permit may appeal the certification or denial. The opportunity to appeal should extend to those adversely affected by a general permit as well as a specific permit.

**2001.H** further provides that the secretary may hold a hearing on the appeal. We have found no federal provision that requires a hearing. It may be sufficient to provide an opportunity for written statements and to thus forego the time and expense of an oral hearing.

**2001.H** also provides that cross-examination of persons presenting oral statements shall not be allowed. Cross-examination of a person presenting an oral statement should be allowed, however, if the oral statement constitutes factual testimony (as opposed to opinion or argument) that a hearing officer could take into consideration in reaching a decision. If the Department wishes to properly limit cross-examination of oral statements, we suggest replacing "oral statements" with "oral argument," or something to that effect.

**2002.E(1)** addresses the content of notice for general permits. Unlike 2001.E(1), 2002.E(1) does not provide for a description of the geographic area. *See* 2001.E(1)(c). We are not aware of any restriction on issuing a general permit for a geographic area smaller than an entire state. If a general permit is intended to apply to an area less than an entire state, then the geographic area should be identified. We therefore suggest including a subsection (c) in 2002.E(1), providing that if a permit is intended to apply to an area less than the entire state, the notice shall include a description of the geographic area to be covered by the permit. This comment also applies to 20.6.2.2003 NMAC.

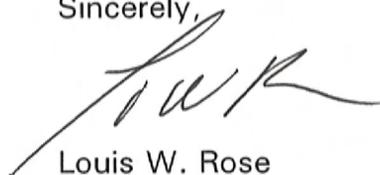
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**2002.H** provides that the final certification will be issued within 60 days unless a hearing is held. Neither 2001.H nor 2003.G contains a reference to a hearing. Unless there is a reason for the difference, suggest deleting the reference to a hearing.

**2003.E(2)(d)** addresses identification of "the name of the affected water." This language is slightly different from that found in 2001.E(2)(d) and 2002.E(2)(d), each of which refer to "the name of the receiving water." It is unclear why the language is different. If there is no basis for the difference, suggest using the same language in all three rules, for consistency.

We appreciate the opportunity to review the draft regulations before they are submitted to the Commission. Please feel free to give me a call if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "LWR", with a long horizontal flourish extending to the right.

Louis W. Rose

LWR: